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No. 98-557

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In The

Supreme Court of the United States

October Term, 1998

CATHERINE M. FORD,

Petitioner,

vs.

TOWN OF GRAFTON,

Respondent.

On Petition for Writ of Certiorari to the Appeals Court for the Commonwealth of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This petition seeks this Court's review of a decision of the Appeals Court for the Commonwealth of Massachusetts. In that detailed decision, the Appeals Court affirmed the trial court's entry of a directed verdict against the petitioner at the close of her case-in-chief. As discussed below, there is no cause for this Court's review of the petitioner's factbound contentions regarding the entry of that directed verdict, contentions which the Appeals Court rejected.

A. The Petition Omits Certain Key Facts And Is Without Proper Support.

In her statement of the case, the plaintiff makes numerous factual allegations without any citation to the record. In her statement of the procedural background, the plaintiff states that two defense motions for summary judgment were denied and that the trial judge entered a directed verdict without an explanatory memorandum. These statements, while technically accurate, mischaracterize what actually occurred. While the plaintiff implies that the denials of the motions for summary judgment were well reasoned, and the allowance of directed verdict was not, the facts are to the contrary.

The defendant's first motion for summary judgment was heard by Judge James Donohue of the trial court. The motion asked for summary judgment both on the State Tort and Federal Civil Rights claims. The judge's entire decision on this complicated motion consisted of one word from the clerk, "Denied." *See* Record Appendix Volume I, pg. 308.

The defendant's second motion for summary judgment was heard by Judge Stephen Neel of the same court. His decision regarding these issues was rendered in a margin endorsement

indicating, with no explanation, that "there remain genuine issues of material fact, the motion is denied." Neither judge indicated in any way the basis for his decision, nor indicated what material facts were in dispute.

In contrast, the trial judge, Diane Kottmyer, heard all of the plaintiff's evidence and allowed extensive argument regarding both the plaintiff's State and Federal claims. The arguments regarding the State Tort claims are found between pages 430 and 455 of Volume II of the trial transcripts. Following these legal arguments, Judge Kottmyer spoke at length. She concluded her remarks on page 456 by stating that the directed verdict for the defendant should enter since "I do see it as not a close case".

Judge Kottmyer also heard extensive argument regarding the Federal claims beginning on page 460 and extending until page 481 of Volume II of the trial transcripts. The Judge explained her reasoning for entering a directed verdict on the Federal claims. This analysis can be found in the transcript between pages 482 and 485. She concluded that

> it is my view that it is not a close question and that under the principles of both constitutional and Mass. Tort Claims Law a claim does not stand in this case, and for that reason I'm directing a verdict.

Trial Transcripts Volume II pg. 485.

It is undeniably sad that the plaintiff was shot and wounded by her ex-husband who then shot himself. However, the undisputed facts establish that a restraining order was in effect from October 18, 1984, until October 25, 1985. During that time, the only act of violence against Ms. Ford was an assault and battery by her husband, Mr. Davidson, on October 22, 1984,

in the Town of Northboro. The Northboro Police Department responded, and Ms. Ford obtained a criminal complaint against Mr. Davidson for that assault and battery. Unfortunately, Ms. Ford decided to drop those charges on March 5, 1985. No other acts of violence against the plaintiff occurred during the pendency of the protective order.

The last documented contact between the plaintiff and the Grafton Police occurred on April 25, 1985, when Davidson was charged with violating the restraining order by Officer Glispin of Grafton. At that time, Officer Glispin testified that he told Davidson that

> I was personally sick and tired of him upsetting Cathy Ford, and that I was going to summons him to court for a violation of 209A, and that every time after that if I had any dealings with him, I would do my best to get him in court every single time he bothered her; I was sick of it.

Trial Transcripts Volume II p. 286. There is no other documented contact regarding the plaintiff between anyone and the Grafton Police until January 17, 1986, the day that Mr. Davidson shot her and then committed suicide.

B. The Petition Neglects To Adequately Detail The Appellate Course Of This Case.

The petitioner appealed the trial court judgment to the Appeals Court for the Commonwealth of Massachusetts. That Court rejected the petitioner's arguments of error, and affirmed the judgment. The petitioner then applied to the Supreme Judicial Court of the Commonwealth for further appellate review. That Court denied the application. Thereafter, the petitioner submitted this petition.

REASONS FOR DENYING THE WRIT

I.

THERE EXISTS NO COMPELLING REASON TO GRANT THE WRIT.

According to Supreme Court Rule 10, a petition for writ of certiorari will be granted "only for compelling reasons." As indicated in Rule 10(b) and (c), the character of the reasons the Court considers with respect to a petitions for a writ of certiorari to a State court, as involved here, include whether a State court (1) has decided an important Federal question in a way that conflicts with the decision of another State court of last resort or of a United States Court of Appeals; (2) has decided an important question of Federal law that is not been, but should be, settled by this Court; or (3) has decided an important Federal question in a way that conflicts with relevant decisions of this Court.

No such compelling reasons exist in this case. Rather, the petition presents only factbound assertions, pertinent only to this case and its parties, which do not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the State or Federal circuits is even alleged.

For these reasons, the Petition for Writ of Certiorari should be denied.

A. The Appeals Court Properly Affirmed the Entry of a Directed Verdict on the Due Process and Equal Protection Claims.

According to her first "question presented," the petitioner seeks relief from the trial court's granting of a directed verdict

as to her due process and equal protection claims, claiming that triable issues of fact existed as to each claim. This Court, however, ordinarily does not grant certiorari merely to review evidence or draw inferences therefrom. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). This question, therefore, does not provide a basis warranting the grant of the petition.

In any event, the trial judge properly entered a directed verdict for the defendant, and the Appeals Court properly affirmed the entry of a directed verdict, on both the due process and equal protection claims.

i. *There Was No Viable Substantive Due Process Claim.*

The petitioner claims as a reason for granting the writ that she had a viable substantive due process claim against the Town because it failed to protect her. The Appeals Court, however, properly determined that under *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." The petitioner does not dispute this point, and thus does not claim that the Appeals Court's decision in any way conflicted with *DeShaney*.

Rather, the petitioner claims that the Town engaged in "affirmative acts" which placed her in a position of danger from her former husband and then failed to protect her. She relied on the case of *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997) in this regard. That case, however, is unavailing because the facts are markedly different.

In *Soto*, the police, knowing that the petitioner's husband had threatened to kill the petitioner and her family if she went to the police to have him jailed for spousal abuse, nonetheless

told the husband that the petitioner's had complained to them about abuse. Four days after the petitioner's first complaint to the police about the abuse, the husband killed himself and the couple's two children. *Id.* at 1058. The plaintiff in that case alleged that informing her husband of her complaints while knowing of his threats was an "affirmative act" which placed her children in a greater position of danger posed by the husband and which led to their deaths. *Id.* at 1063.

In sharp contrast, the Town here did not take any such affirmative act which placed the petitioner in any greater danger than existed when she first contacted its police department. It in no way created or enhanced any danger to the petitioner, and the petitioner has not identified any actions to indicate otherwise. Indeed, the Police Department successfully protected her from physical harm during the time the restraining order was in effect. It is undisputed that during the pendency of the restraining order the plaintiff was not physically harmed. The petitioner allowed the order to expire and, three months later, her former husband inflicted the injuries upon her.

In light of the foregoing, the Appeals Court properly rejected the petitioner's affirmative acts argument, noting that the Town's acts were not the kind of "affirmative acts" that would give rise to a constitutional duty to protect. This decision was a plainly correct application of the law as stated in *DeShaney* and *Soto* and their progeny. There exists no compelling reason to grant the writ on the basis of this fact-based substantive due process claim.

ii. *There Was No Viable Procedural Due Process Claim.*

Similarly, there exists no compelling reason for granting the petition for writ of certiorari on the procedural due process claim.

The petitioner argues that the protective order she has obtained created a property interest in police enforcement that was cognizable under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The Appeals Court rejected this argument for the simple reason that the petitioner did not have a protective order against her former husband at the time of her injuries. Given this important fact, the Appeals Court did not even decide the question whether a protective order created a *Roth* property interest secured by due process. The absence of such an order in this particular case clearly defeated any claim of a property interest therein.

The petitioner attempts to sidestep this fatal defect by arguing that her claim in this regard included the Town's failure to arrest Davidson during the term of the protective order and/or to advise her of her entitlement to police protection. Contrary to the implication in the petition, the Appeals Court did address this argument and concluded that, even if the Town had deprived her of her property right during the term of the order, that deprivation was not the actual cause of her injuries some months after the order had expired.

The Appeals Court decision thus, again, is in accord with the law, and not in conflict with any State or Federal circuit decision. This claim does not state a reason warranting review by this Court.

iii. *There Was No Viable Equal Protection Claim.*

The petitioner's fact specific argument on her equal protection claim also does not state a compelling reason warranting this Court's grant of the writ.

The petitioner asserts that she had introduced sufficient evidence to show that the Town had a policy or practice of

providing less protection to victims of domestic violence than to victims of other crimes, and that such policy was motivated by gender discrimination. Applying the "stringent standards" identified in *Soto v. Flores*, 103 F.3d at 1068, as being in keeping with the Supreme Court's approach to equal protection challenges, the Appeals Court correctly rejected this assertion. The Court properly determined that the petitioner had not made a showing of systematically different treatment by the Town between domestic abuse cases and non domestic abuse cases. Her offer of better treatment given to one female, non domestic violence victim did not show a pattern that constituted a custom or policy of selective enforcement, and deliberate indifference in her case alone, even if shown, would be insufficient to demonstrate different treatment. *See Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 695 (10th Cir. 1988). Indeed, the plaintiff's evidence suggested that The Town treated complaints by women seriously.

There exists no compelling reason for this Court to grant a writ on the basis this fact-specific, case-specific claim.

CONCLUSION

Contrary to the petitioner's assertion, this case does not directly affect the viability of every single domestic abuse protective order. A determinative point in this particular case is that there was no protective order in effect at the time the petitioner suffered her injuries. This fact alone warranted the entry of a directed verdict against her after her case-in-chief under application of settled law.

For the reasons given above, this Court should deny this Petition for Writ of Certiorari.

Respectfully submitted,

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